

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: B.C.O.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: D.M. NATURAL FATHER

Appellant

No. 1042 WDA 2013

Appeal from the Order Entered on May 31, 2013
In the Court of Common Pleas of McKean County
Orphans' Court at No.: 42-13-0087

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and WECHT, J.

MEMORANDUM BY WECHT, J.

FILED JANUARY 07, 2014

D.M. ("Father") appeals from the May 31, 2013 order denying his "Motion for Blood Tests to Determine Paternity" of B.C.O. ("Child"), a boy born in March 2006 to M.O. ("Mother").¹ We affirm.

Mother resides in Bradford, Pennsylvania, and Father is incarcerated in the Cayuga Correctional Facility in Moravia, New York. Father and Mother had a brief relationship and were intimate around the time that Child was conceived. Mother and Father never married. The relationship between Mother and Father ended prior to Child's birth. Father was aware of

¹ An order denying genetic testing to determine paternity is immediately appealable. *Buccieri v. Campagna*, 889 A.2d 1220, 1220 n.1 (Pa. Super. 2005).

Mother's pregnancy. Trial Court Memorandum & Order ("T.C.M."), 5/22/2013, at 1-2 (unpaginated).

Father had no contact with either Mother or Child from 2006 to 2008. During portions of that time, Mother had a Protection from Abuse ("PFA") order against Father, which forbade him from contacting Mother. Also, Father was on probation for part of that time, the terms of which also prohibited contact with Mother. However, Father's probation conditions did not forbid contact with Child, and Father was permitted to return to McKean County for custody visits with Child. *Id.* at 2. After 2008, Father made one attempt to visit Child, but he was asked to leave by Mother's uncle. Father has never filed a complaint for custody of Child. Trial Court Opinion ("T.C.O."), 7/23/2013, at 3. Mother testified that Father contacted her three times via Facebook in 2010. Notes of Testimony ("N.T."), 5/24/2013, at 62.

On March 16, 2013, Mother filed a petition for involuntary termination of parental rights, seeking the involuntary termination of Father's parental rights, so that her new husband, whom she married in February 2013, could adopt Child. On May 20, 2013, Father filed a motion for paternity testing, pursuant to 23 Pa.C.S.A. § 5104. Father asserted that there was a real possibility that he was not Child's biological father and that he would not contest the involuntary termination if he was not Child's father. On May 24, 2013, the court held a hearing on Father's motion. The trial court denied Father's motion, ruling that Father was estopped from challenging paternity, and relying upon *Bucciari v. Campagna*, 889 A.2d 1220 (Pa. Super. 2005).

Father filed a timely appeal on June 21, 2013. Father also filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and Pa.R.A.P. 1925(b) on that date.

Father's issues on appeal are as follows:

1. Did the trial court err as a matter of law and/or commit an abuse of discretion in its reliance [upon] **Buccieri** when it failed to recognize that there is an important factual distinction between that case and the instant case because in the instant case there is a genuine question as to who is the child's biological father?
2. Did the trial court err as a matter of law and/or commit an abuse of discretion in [its] reliance [upon] **Buccieri** when it failed to recognize that the instant case arose in the context of a termination of parental rights proceeding?
3. Did the trial court err as a matter of law and/or commit an abuse of discretion in its reliance [upon] **Buccieri** when it held that [Father] had abandoned [Child]?

Father's Brief at 4.

We review an order denying genetic testing for an abuse of discretion. **See Barr v. Bartolo**, 927 A.2d 635, 639 (Pa. Super. 2007). "An abuse of discretion is not merely an error of judgment, but rather a misapplication of the law or an unreasonable exercise of judgment." **Id.** (citation omitted). We will not disturb the trial court's factual findings so long as they are supported by sufficient evidence. **Vargo v. Schwartz**, 940 A.2d 459, 462 (Pa. Super. 2007).

For the purposes of our disposition, we address Father's issues together. Father contends that the trial court committed an abuse of

discretion in its reliance upon this Court's holding in *Buccieri*, *supra*, and its application of the factual circumstances and reasoning in *Buccieri*, in determining that Father was estopped from requesting blood tests to determine the paternity of Child. Rather, Father asserts that the trial court should have found that *Buccieri* was factually distinguishable from this case. In his argument, Father notes that in *Buccieri* there was no genuine doubt that the appellee was the father of the subject child; that the father attempted to assert his parental rights with a custody petition; and that there was an eight-year period of inactivity on the father's part. Father argues in the present appeal that the trial court should not have relied upon *Buccieri* since the factors that led the trial court in *Buccieri* to hold that the father was estopped from requesting blood testing are not present in this case. Father contends that paternity by estoppel does not apply because he never accepted paternity. Father's Brief at 7-17.

Traditionally, in paternity cases, we first consider the presumption of paternity, which only applies when a child is born into an intact marriage. *Vargo*, 940 A.2d at 463. When the presumption does not apply, as is the case here because Mother and Father were never married, we next look to the doctrine of paternity by estoppel. Estoppel is a paternity determination that is based upon the conduct of the mother and the father, and it bars a party who had acted as the father from disputing paternity. *Id.*

By statute, paternity tests can be sought when relevant to a case. "In any matter subject to this section in which paternity, parentage or identity of

a child is a relevant fact, the court . . . upon motion of any party to the action . . . shall order the mother, child and alleged father to submit to blood tests.” 23 Pa.C.S.A § 5104(c). Despite the mandatory language of the statute, this Court has held that the right to paternity tests is not absolute. **Miscovich v. Miscovich**, 688 A.2d 726, 730 (Pa. Super. 1997); **Woy v. Woy**, 663 A.2d 759, 761 (Pa. Super. 1995). When the presumption of paternity or paternity by estoppel applies, a request for paternity testing shall be denied. **Mischovich**, 688 A.2d at 730. While we normally look to the father’s affirmative actions in caring and providing for the child in finding estoppel, we have also denied paternity testing to fathers who have abandoned a child. **Buccieri**, 889 A.2d at 1226 (“Although estoppel has been applied most frequently to prevent fathers from denying paternity when they have acted as father in the lives of their children, the doctrine applies equally . . . where [putative father] denied his paternity, never held himself out to be father, and never took responsibility. . . .” (bracketed material in original)).

In applying estoppel, the trial court relied upon **Buccieri**. In that case, the mother and father never married and were involved romantically only briefly. **Id.** at 1220-21. No father was listed on the child’s birth certificate. The father filed a complaint for partial custody, but then filed for paternity testing. The record reflected that, while informed of the pregnancy, the father had no contact with the mother or the child, except for a chance encounter when the child was a few years old. Further, Mother

was engaged and had formed a family with her three children and her fiancé, who intended to adopt the child. *Id.* at 1221. Eight years passed between the child's birth and the hearing on the father's petition. *Id.* at 1220. Based upon its conclusion that the father had an absolute right to paternity testing, the trial court granted his request. *Id.* at 1227.

This Court considered the application of estoppel in holding the father to his prior conduct. In doing so, we relied upon prior cases in which a father sought paternity testing after a lack of contact with the child. *Id.* at 1224-26 (reviewing ***Strayer v. Ryan***, 725 A.2d 785 (Pa. Super. 1999) (holding that father could pursue genetic testing of eleven-month-old child where father attempted to visit and support child, but was refused); ***C.T.D. v. N.E.E.***, 653 A.2d 28 (Pa. Super. 1995) (holding that father was estopped from pursuing genetic testing of two-year-old child where father made no attempt to contact the child and there was no evidence that mother prevented father from visiting the child)). We reversed the trial court, holding that, on the record as it had been developed, estoppel applied, and the father's inactivity barred him from confirming or asserting his paternity. *Id.* at 1228. ***Cf. Snyder v. Wyland***, 821 A.2d 611 (Pa. Super. 2003) (holding that the father did not abandon child in waiting four years to file for custody when father was a minor at the time of the child's birth, father periodically visited with the child and mother and provided holiday gifts, and father's attempt to provide financial support was refused by maternal grandparents).

As in *Buccieri*, Father and Mother had a brief relationship resulting in the conception of Child. The relationship lasted only a few months, ending before Child's birth. N.T. at 9-10. Further, as in *Buccieri*, Father knew that Child had been born; however, his name was not listed on the birth certificate. N.T. at 13, 18. The trial court considered that Father had impediments to forming a relationship with Child due to the PFA order and probation that prevented contact with Mother. *Id.* at 16-18, 19, 30.

However, the trial court found that Father still had five years during which he could have attempted to establish a relationship with Child. Father testified that, in the beginning, he bought room decorations and a crib for Child. He also sent some text and Facebook messages to Mother. However, Father admitted that he never raised Child for a significant period of time; never paid child support; never established a significant relationship with Child; and never signed an acknowledgment of paternity or filed a petition for custody. N.T. at 13-14, 56. The trial court noted that competent evidence revealed that Father only made "a few weak attempts, but never made a concerted effort." T.C.M. at 4.

In addition, Father testified concerning M.M., another alleged love interest of Mother, and the possibility that M.M. could be Child's father. N.T. at 11-13. Mother testified that Father was Child's father and that she did not have sexual relations with anyone other than Father in the year preceding Child's birth. N.T. at 50-51. The trial court found Mother's testimony to be credible. T.C.O. at 2.

Based upon the record, the trial court concluded that Father had abandoned Child and was estopped from seeking paternity tests to confirm or deny his paternity. Therefore, the trial court denied the motion for paternity tests. After a careful review of the record and applicable case law, we discern no abuse of discretion in the trial court's application of the doctrine of paternity by estoppel to the facts of this case.

However, that does not end our inquiry. Recently, our Supreme Court addressed the application of paternity by estoppel in *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012). The facts of that case resemble the more typical paternity by estoppel case: the mother sought child support from the biological father after her marriage ended, and the father asserted that the former husband was the legal father pursuant to the doctrine of paternity by estoppel and, therefore, responsible for the child's financial support. *Id.* at 799. The Court held that "the determination of paternity by estoppel should be better informed according to the actual best interests of the child." *Id.* at 809. Because the record was not developed sufficiently, the case was remanded to determine the child's best interests, including "the closeness of [the child's] relationship with [the former husband]" and whether any "harm . . . would befall [the child] if [the former husband's] parental status were to be disestablished." *Id.* The Court also recognized the multiple fact patterns possible in paternity by estoppel cases, and that applying the doctrine with the child's best interests in mind would require development and refinement as those various fact patterns were examined. *Id.*

Following *K.E.M.*, we must view the application of the paternity by estoppel doctrine through the lens of Child's best interests. Although the fact pattern of this case is significantly different than that of *K.E.M.*, this case nonetheless falls within the ambit of cases in which the Supreme Court foresaw that refinement and development of the application of best interests to the doctrine would be required. As in *K.E.M.*, the record is short on details as to Child's best interests, despite the fact that the hearing occurred after *K.E.M.* mandated courts to consider those interests. As noted above, Father has not assumed any parental duties, has not supported Child financially, and has not pursued custody of Child. Meanwhile, Mother has married and she, Child, and Child's younger half-sibling live as an intact family with Mother's husband. N.T. at 48. Further, Mother's husband intends to adopt Child. *Id.* at 57.

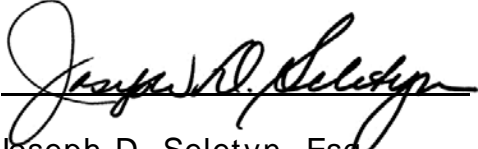
The *K.E.M.* court was concerned that the record was devoid of evidence about the child's relationship with the mother's husband and about potential harm from severing that relationship. 38 A.3d at 809. Here, however, the concerns about the relationship between Child and Father and any potential harm from severing that relationship are not implicated. Child has no relationship with Father. Instead, Child's relationship is with Mother. It is clear that it is in Child's best interest for paternity by estoppel to be applied, as the trial court did. Once paternity by estoppel applied and

Father's motion for paternity testing was denied, the path was cleared for the termination of parental rights hearing to commence.²

Based upon the foregoing reasons, we affirm the order denying Father's request for a paternity test.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/7/2014

² We express no opinion as to whether Father's parental rights should be terminated or whether Mother's husband should be allowed to adopt Child. Such questions are not before us and a record has not been developed on either issue.